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In The

# Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS, as next friend of Anya Savannah Haas and Mackinley Xavier Haas,

*Petitioners,*

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF THE PETITIONERS


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## STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, NACDL has almost 10,000 members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military personnel and law professors. NACDL has members in all fifty states, and the American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates.

Among NACDL's objectives is to deter overreaching conduct by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. NACDL urges this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit as the lower court decision provides for vast officer discretion, permitting the overzealous officer to arrest any person he chooses for the pettiest of offenses. The Fourth Amendment is designed to constrain the discretion of the officer in the field and assure that his conduct in seizing citizens, when permissible, is reasonable. The Fifth Circuit decision provides neither assurance. Accordingly, NACDL files this brief on behalf of the Petitioners.

The Association of Federal Defenders ("AFD") was formed in 1995 to enhance the representation under the

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[1] Both parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. AFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file amicus briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. We believe that this mission calls upon us to join in asking the Supreme Court to reverse the lower court's decision in the instant case. Although it is a civil rights action rather than a criminal case, the instant case presents an issue of great importance in criminal law: whether the Fourth Amendment prohibits the use of custodial arrests for fine-only traffic offenses. A full custodial arrest invades one's privacy interests and one's dignity, and can often lead to criminal prosecution on other charges. It is in the interest of our clients to urge this Court to prohibit custodial arrests for ordinary traffic offenses.

## SUMMARY OF ARGUMENT

This Court's Fourth Amendment doctrines prohibit an officer who issues a traffic citation from searching the motorist's vehicle absent consent or probable cause of other wrongdoing. *Knowles v. Iowa*, 525 U.S. 113 (1998). During the stop, the officer is further prohibited from patting down the motorist, or the interior of her vehicle, for weapons without reasonable suspicion to believe the motorist is armed. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983); *Terry v. Ohio*, 392 U.S. 1 (1968). If the search of the stopped motorist's car is to be based on consent, that consent must be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968).

The lower court's opinion in the instant case permits an officer, upon the mere observation of a traffic offense to take



the motorist into custody. *Atwater v. City of Lago Vista*, 195 F.3d 242, 244-45 (5th Cir. 1999) (en banc). As a result of this arrest, a search of the motorist's person is permitted as well as a search of the cabin of the automobile. *Chimel v. California*, 395 U.S. 752, 763 (1969); *New York v. Belton*, 453 U.S. 454 (1981). Neither consent nor probable cause stand as prerequisites to a complete search of a traffic offender's person or her car under the reasoning of the lower court. Contrary to this Court's holding that a traffic stop is analogous to *Terry* stop, and therefore limited in its length and scope, *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), the lower court's decision permits every degree of intrusion associated with a full arrest to be a part of any traffic stop.

The lower court's opinion does not make a custodial arrest for the offense of failure to wear a seat belt mandatory, but allows an officer to use his discretion in determining whether the offense warrants a custodial arrest. This discretion permits an officer to search the person and vehicle any traffic offender of his choosing. The recently documented phenomenon of racial profiling has demonstrated that drug interdiction officers select persons of certain races in much higher frequency to search for drugs. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-354 (1998). Permitting officer absolute discretion to search any traffic offender for drugs will doubtless lead to the same sort of racial biases that have infected drug interdiction efforts thus far. The lower court places no barrier in the way of the discriminatory searches, but simply requires the officer to subject the motorist he desires to search to the indignity of a full custodial arrest.

The arrest the lower court permitted -- the arrest that would permit an officer to search any traffic offender of his choosing -- is simply forbidden by the Constitution. The common law, the starting point of this Court's Fourth Amendment analysis, permitted a misdemeanor arrest only

where the offender threatened a continuing affray if left at large. *See* Sir James Stephen, *History of the Criminal Law of England* 193 (1883).

The intrusion is further utterly unreasonable when the degree of the intrusion is weighed against the State's interest in the custodial arrest. *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (weighing state's interest in intrusion against the effect of the *manner* of seizure). The State may revoke the license of any traffic offender who fails to appear on the charge or fails to pay the fine. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 267 (1989). In the instant case, the maximum penalty for the offense was a $50.00 fine.

The lower court decision ignores the common law, fails to balance the individual's interest in liberty and privacy against the State's meager interest in this custodial arrest, and would eviscerate virtually all of this Court's doctrines dealing with the interaction of officers and traffic offenders.

## ARGUMENT

### I. STANDARDLESS DISCRETION TO ARREST FOR ANY TRAFFIC OFFENSE PERMITS AN OFFICER TO SEARCH THE PERSON AND VEHICLE OF ANY TRAFFIC OFFENDER OF THE OFFICER'S CHOOSING.

The power to make a custodial arrest for a misdemeanor traffic offense permits an officer to select, in his discretion, any minor offender, search her car and subject her to the indignity of an arrest and search of her person. This power



removes any constitutional constraint on officers performing traffic stops. This power permits personal and institutional prejudices about the sort of people who are transporting contraband to dictate who shall suffer the inconvenience and insult of a custodial arrest. This power, conveying unbridled discretion and a license to discriminate, cannot withstand constitutional scrutiny.

#### A. Arresting a Motorist for a Traffic Offense Amounts to an End-Run Around this Court's Doctrines Forbidding a Search Absent Consent or Probable Cause.

A traffic stop is analogous to a *Terry* stop and therefore the "stop and inquiry must be reasonably related in scope to their justification for the intrusion." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) and *Terry v. Ohio*, 392 U.S. 1, 29 (1968)). An arrest, in lieu of a citation, for a misdemeanor traffic offense greatly expands the scope of a traffic stop allowing intrusions otherwise justified only on a showing of probable cause or the motorist's consent.

When an officer issues only a citation for a traffic offense, this Court permits the officer to search the vehicle only if the motorist consents or if the officer develops probable cause to suspect other wrongdoing. *See Knowles v. Iowa*, 525 U.S. 113 (1998) (forbidding search incident to arrest). Consent must be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973). Undue police coercion will not yield a valid consent. *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968). Limited intrusions to protect the officer from an armed motorist are permitted, but only if the officer has reasonable suspicion that the motorist is armed and the officer may intrude no more than necessary to discover weapons immediately in the reach of the motorist. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983);

*Terry v. Ohio*, 392 U.S. 1 (1968). If an officer may simply arrest any traffic offender, he may circumvent these doctrines merely by electing to subject the misdemeanant to a custodial arrest.

A search incident to arrest is permitted whenever a motorist is taken into custody, regardless of the seriousness of the offense. *United States v. Robinson*, 414 U.S. 218 (1973). The motorist's person may then be searched incident to arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969). The entire cabin of the automobile may be searched incident to the arrest. *New York v. Belton*, 453 U.S. 454 (1981). Any part of the automobile may then be searched by officers if officers are instructed by their superiors, as a matter of routine, to inventory the items in that part of the automobile. *See Florida v. Wells,* 495 U.S. 1, 4-5 (1990); *United States v. Lumpkin,*159 F.3d 983, 987 (6th Cir. 1998) (permitting inventory search of engine compartment of vehicle); *United States v. Kordosky*, 921 F.2d 722, 723 (7th Cir. 1991) (permitting inventory search of locked sidewall compartment of trunk).

This Court recently and unanimously held that an officer may not perform a search incident to citation for an ordinary traffic offense -- that is, if an officer does not actually arrest a suspect, a search incident to arrest is unconstitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). This decision assumes that a custodial arrest for a misdemeanor traffic offense alone does not permit a custodial arrest.

This Court has held that where police have probable cause to arrest a suspect, it is constitutionally irrelevant whether the search incident to arrest occurs before or after the suspect is actually placed under arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). As Justice Harlan wrote,



> If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

*Peters v. New York*, 392 U.S. 40, 77 (1968) (Harlan, J., concurring).

If the lower court's decision in the instant case, permitting an officer to arrest any traffic offender, accurately states the law then the officer may search any motorist, so long as he does so before issuing the citation. Under *Rawlings* and *Peters*, if an officer has the power to perform a custodial arrest, he may perform a search incident to arrest even before he announces that the suspect is in a state of custody. If the lower court opinion is correct then the officer who has seized a motorist, but has yet to issue a citation or perform a custodial arrest, has the power to take the motorist into custody and thus may conduct a search incident to arrest under *Rawlings* and *Peters*.

This Court's unanimous opinion in *Knowles* is eviscerated if a search incident to citation is forbidden after the issuance of a citation, but allowed moments before its issuance. The Court's analysis of the doctrine of search incident to arrest in *Knowles* further demonstrates it assumed that a custodial arrest for an ordinary traffic violation is constitutionally unreasonable. The State of Iowa argued that a search incident to a traffic violation was permitted because the stopped motorist might try to destroy evidence of another crime or destroy evidence relating to his identity. This Court found the possibility that an officer would stumble onto

evidence of an unrelated crime to be remote. The Court further found that "[a]s for the destruction of evidence relating to identity, if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation." *Knowles*, 525 U.S. at 118. The Court thus signaled that an officer must have a basis for a custodial arrest -- a principled reason for a significant intrusion on the motorist's liberty and a search otherwise forbidden.

A debate raging in the lower courts illustrates the nearly universal acceptance of the idea that the Fourth Amendment limits an officer's power to intrude on the liberty of a mere traffic offender. The lower courts are deeply divided on whether an officer who stops a traffic offender may make inquiries unrelated to the traffic offense, specifically whether an officer may request consent to search for drugs absent suspicion of wrongdoing beyond the traffic infraction. The nature of the debate demonstrates the near-universal assumption that an arrest for a mere traffic offense is forbidden by the Fourth Amendment.

A majority of the courts hold that questions during a traffic stop must be limited to the purpose of the traffic stop, or to issues related to suspicion reasonably raised during the stop.[2] These courts rely upon this Court's doctrine that a

[2] *United States v. Holt*, No. 99-7150, 2000 U.S. App. LEXIS 21430 (10th Cir. Aug. 24, 2000); *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir. 1999); *United States v. Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999); *United States v. Walden*, 146 F.3d 487, 490 (7th Cir. 1998); *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996); *United States v. Finke*, 85 F.3d 1275, 1278-79 (7th Cir. 1996); *United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States v. Perez*, 37 F.3d 510, 513 (9th Cir.1994); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994); *Mitchell v. United States*, 746 A.2d 877, 887-90 (D.C. 2000); *Almond v. State*, 530 S.E.2d 750, 752 (Ga. Ct. App. 2000); *State v. Myers*, 798 P.2d 453, 457 (Idaho Ct. App. 1990); *Lockett v. State*, 720 N.E.2d 762, 771 (Ind. Ct. App. 1999); *State v. McNaughton*, 924 S.W.2d 517, 523 (Mo.



traffic stop, like a *Terry* stop, is bounded in its scope and inquiry to the basis for the seizure. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). The remainder of the courts to consider this issue hold that an officer is free to ask whatever questions he pleases so long as the length of the traffic stop is not prolonged by the officer's questions.[3] These courts draw from this Court's teachings that questioning of a citizen at liberty is neither a search nor seizure. *See Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion). If police questioning is not a Fourth Amendment event, then it may not expand the scope of a seizure.

Either position assumes that there are limits on traffic stops, that an officer may not place a motorist in handcuffs and transport her to the police station for booking merely because the motorist committed a traffic offense. The majority view considers questioning unrelated to the stop that leads to a search to exceed the bounds of a legitimate traffic stop. The lower court's opinion in the instant case would not even require an officer to engage in questioning to obtain consent or probable cause to search the car -- a search could

Ct. App. 1996); *State v. Chapman*, 753 A.2d 1179, 1185 (N.J. Super. Ct. App. Div. 2000); *State v. Taylor*, 973 P.2d 246, 252 (N.M. Ct. App. 1998).

[3] *United States v. $404,905.00 in Currency*, 182 F.3d 643, 648 (8th Cir. 1999); *United States v. Jacobs*, 173 F.3d 426, 1999 U.S. LEXIS 2691 (4th Cir. Feb. 22, 1999); *United States v. Palomino*, 100 F.3d 446, 450 (6th Cir. 1996); *United States v. Davis*, 61 F.3d 291, 300 (5th Cir. 1995); *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994); *United States v. Grillo*, 40 F.3d 1245, 1994 U.S. App. LEXIS 30721 (4th Cir. Nov. 3 1994); *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993); *People v. Brown*, 72 Cal. Rptr.2d 793, 796 (Cal. Ct. App. 1998); *State v. Kremen*, 754 A.2d 964 (Me. 2000); *State v. Powell*, 5 S.W.3d 369, 376 (Tex. Ct. App. 1999); *State v. Gaulrapp*, 558 N.W.2d 696, 700 (Wisc. Ct. App. 1996). The Eighth Circuit is presently divided on this issue. *See $404,905.00 in Currency*, 182 F.3d at 648 (finding officer questioning during a stop does not implicate the Fourth Amendment); *Allegree*, 175 F.3d at 650 (holding that officer questioning during a traffic stop must be reasonably related to basis for the stop).

automatically flow from the officer's election of an arrest instead of a citation.

The minority view recognizes that police questioning may not prolong the length of a traffic stop, unless the officer has suspicion of wrongdoing beyond the traffic offense. The lower court's opinion would permit officers to extend the length of a traffic stop, absent suspicion of any wrongdoing beyond the traffic offense, not merely for the length of question unrelated to the offense, but for the length of time required for the motorist to be booked, fingerprinted, and released on bond.

The debate in the lower courts concerns the sort of questions an officer may ask in order to obtain probable cause or consent to search a traffic offender's car. The debate would be utterly preempted by the doctrine accepted by the lower court -- a passkey to search the person and vehicle of any traffic offender.

If an officer may conduct a custodial arrest for any traffic violation, then he need not obtain valid consent to search a car, he need only *decide* to arrest the minor traffic offender. His search then is not bounded by a search to discover weapons and is not predicated on any suspicion. And, according to the lower court's holding, the decision to arrest is entrusted to the unguided discretion of the officer who is aware that issuing a citation forbids a search of the car while an arrest, for the same offense, entitles a full search.

### B. The Recently Documented Phenomenon of Profiling would be Permitted and Perpetuated by the Doctrine the Lower Court Announced.

The lower court's decision in the instant case gives officers the ability to select any minor traffic offender from the universe of traffic offenders, arrest the motorist and



search her automobile. This vast power will lead to even more egregious examples of the over-reaching by drug interdiction officers thoroughly documented in the lower courts and in the academic literature.

"Very few drivers can traverse any appreciable distance without violating some traffic regulation." B. James George, *Constitutional Limitations on Evidence in Criminal Cases* 65 (1973 ed.) *Whren v. United States*, 517 U.S. 806 (1996), permits an officer to stop any motorist who has committed any traffic infraction, however minor. Given the extensive regulation of motor vehicles and their operation, and the human imperfections of all drivers, the lower court's opinion permits an officer to select any motorist he desires, arrest her and thereby acquire the right to search the entire car.

Beyond an officer's interest in aggressively engaging in "the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 13 (1948), forfeiture laws have created a powerful incentive for officers to inspect as many automobiles as possible for the presence of drugs. Even a relatively small amount of unlawful contraband permits the forfeiture of an automobile carrying the contraband. The effect of this bounty to the state on an individual officer cannot be overstated. The financial existence of many of the drug interdiction units depends on the bounty from forfeiture, creating a powerful economic incentive for officers to search a many cars as possible for drugs. *See* Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Agenda*, 65 U. Chi. L. Rev. 35, 76-84 (1998) (noting impact of forfeiture laws on patterns of prosecution).

In *United States v. Freeman*, 209 F.3d 464, 467 (6th Cir. 2000), Judge Clay observed "a troubling pattern or practice by some members of the Shelby County Sheriff's Department drug interdiction squad of stopping 'target' vehicles on

questionable probable cause grounds . . . in order to search for contraband." In *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995), the Sixth Circuit offered a caution to officers:

> we [have given] the green light to police officers to stop vehicles for any infraction, no matter how slight, even if the officer's real purpose was to hope that narcotics or other contraband would be found as a result of the stop[, and because] . . . we have extended this authority to *the broadest extent possible*, . . . we have a duty to see that it is not abused.

*Freeman*, 209 F.3d at 471 (citing *Mesa*, 62 F.3d at 162) (emphasis added).

*Freeman* noted a systemic pattern of police perjury and questionable traffic stops by a drug interdiction team in its efforts to search automobiles it had no basis to suspect contained contraband. 209 F.3d at 467-70 (Clay, J., concurring). Systemic abuses of the power to enforce traffic laws have been well documented. The incentive to search cars for drugs has further led officers to disproportionately stop and search minority motorists with no suspicion of wrongdoing beyond an ordinary traffic violation. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-354 (1998); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. and Criminology 544, 560-69 (1997). In the search for drugs, officers have substituted race for suspicion. *See* Maclin, *supra* at 344-46.

To curb one well-documented pattern of racial profiling by police officers on the New Jersey Turnpike, the United States Department of Justice entered into a consent decree with the New Jersey State Police. In that decree, the New Jersey State Police were prohibited from allowing a drug dog



to sniff the exterior of an automobile for drugs unless there was a basis for using the dog and prohibited from requesting consent to search for drugs without a reasonable suspicion that drugs would be discovered. Consent Decree, *United States v. New Jersey*, Civ. No 99-5970, ¶¶ 28, 32-33 (MLC) (D.N.J.) (visited Sept. 10, 2000)<http://www.doj.gov/crt/split/documents/jerseycomp.htm>.

By limiting the ability of officers to search for drugs when they lack suspicion, the incentive of officers to stop motorists because of inarticable hunches about the sort of people who transport drugs is diminished. Substantial hurdles stand between the officer and the search he desires but may not legally justify. To even request consent, under the New Jersey Consent Decree, he must develop reasonable suspicion and even then the will of the motorist can prevent his search unless the officer develops probable cause during the seizure.

Permitting the mere observation of a traffic offense to allow an arrest of the motorist, thus a complete search of her person and car, has the opposite effect. Officers, under the lower court's holding, are permitted in their unguided discretion, to search the car of any person committing any traffic offense. Driven by a powerful economic incentive to discover contraband-carrying forfeitable cars, officers given the power to arrest and search any traffic offender could be expected to do no better than their predecessors. Arrests for traffic offenses, carrying with them the right to examine the contents of the motorists' automobiles, will turn on popular myths about the sort of people who deal drugs.

Responding to the Petitioner's argument in *Whren v. United States* that officers may use illegitimate factors to determine which infractions to prosecute, this Court held that practical realities prevented limiting officer discretion to prosecute any traffic offender. "[W]e think there is no

realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure." *Whren*, 517 U.S. at 819. The scope of the seizure justified by the observation of an ordinary traffic infraction, however, may be readily limited by a common law rule -- an arrest for a misdemeanor is forbidden absent a threat that the misdemeanant will engage in an act of violence if left at large. Sir James Stephen, *History of the Criminal Law of England* 193 (1883) By limiting the officer's power to arrest traffic offenders, he is denied the ability to search traffic offenders absent suspicion or consent.

The common law rule therefore promotes enforcement of traffic laws based on an officer's assessment of which traffic offense warrants prosecution, rather than the selection of offenders based on hunches or profiles of the sort of people who might be committing more serious crimes. While not limiting the type of offender the officer may initially seize, the common law rule limits the scope of the officer's intrusion and investigation of an ordinary misdemeanant. And by removing the officer's power to automatically investigate crimes he has no reason to suspect, his initial seizure, limited to issuing a citation for the traffic offense, is far less likely to turn on his conceptions about the type of motorist transporting drugs.

## II. THE COMMON LAW AT THE TIME OF THE FOURTH AMENDMENT'S ADOPTION AND THE MORES OF MODERN SOCIETY FORBID THE ARREST OF AN ORDINARY TRAFFIC OFFENDER.

This Court looks first to the common law to determine whether a governmental intrusion satisfies the Fourth Amendment. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The common law did not permit a constable to make an arrest for a misdemeanor unless it was committed in his



presence and involved an affray that was likely to continue. Sir James Stephen, *History of the Criminal Law of England* 193 (1883). Changes in societal mores or technology permit deviations from the common law's starting point, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), but contemporary society finds an arrest for a misdemeanor repugnant and has used its computer technology to assure that traffic offenders may be prosecuted without resort to arrest. Contemporary legislation in many states has adopted the common law rule. Modern technology provides means of immediately determining a misdemeanant's identity and if his license is suspended in any jurisdiction for failure to appear, this information is immediately available to any officer in the country. Technological advancements and legislative indications of contemporary mores therefore demonstrate the modern efficacy of the common law limitation on an officer's power to arrest for a misdemeanor.

### A. The Common Law Permitted a Misdemeanor Arrest Only Where an Affray was Likely to Continue.

The decisions of English courts prior to, and roughly contemporaneous with, the adoption of the Fourth Amendment illustrate that an officer was permitted to arrest only in the event of an affray that would continue unless the parties were arrested. *Regina v. Tooley*, 92 Eng. Rep. 349, 352 (K.B. 1710); *Cook v. Nethercote*, 172 Eng. Rep. 1443, 1445 (1835).

> The common law did not authorise the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace *either by an affray or by violence to an individual.* In such cases the arrest had to be made not so much for the purpose of bringing

> the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission.

Sir James Stephen, *History of the Criminal Law of England*, 193 (1883) (emphasis added).

Lord Holt observed in 1710 that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest." *Regina v. Tooley*, 92 Eng. Rep. 349, 352 (K.B. 1710). In 1835, Baron Alderson described an officer's power to arrest for a misdemeanor as limited to suppressing breaches of the peace that would recur unless the parties were arrested.

> If . . . there had been an affray, and that affray were over, then the constable had not and ought not have the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of the peace; and where a breach of the peace has been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from the magistrate.

*Cook v. Nethercote,* 172 Eng. Rep. 1443, 1445 (1835). Not surprisingly, Baron Alderson used the example of an affray as a breach of the peace that could continue absent an arrest. As one modern commentator has noted, "[t]his is to say that the arrest was not strictly part of the punishment process. It was mostly for the purpose of separating the combatants and detaining them to prevent further violence." Edward C. Fisher, *Laws of Arrest* 189 (1967).



Indeed this Court has recognized that the common law imposed limitations on an officer's power to arrest for a misdemeanor. "A peace officer . . . has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Carroll v. United States*, 267 U.S. 133, 157 (1925).[4]

The offense of driving without a seat belt is not one that threatens the public tranquility -- no violence is intended or occasioned by one who elects to travel the highway less than secure in the event of an accident. Certainly nothing beyond the fact the motorist was once caught without a seat belt suggests that even this minor crime will continue lest she is immediately removed from the roadway. The common law, the starting point in this Court's analysis of the reasonableness of an intrusion, simply did not contemplate an arrest for such a minor, non-violent misdemeanor.

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[4] Sir James Stephen, Lord Holt and Baron Alderman use the terms breach of the peace and affray interchangeably. Stephen, *supra,* at 193; *Tooley*, 92 Eng. Rep. at 352; *Nethercote*, 172 Eng. Rep. at 1445. Sir William Blackstone in his *Commentaries on the Laws of England* labeled an affray as one subset of the category of crimes under the umbrella "breach of the peace", a category also including libel, false prophesies and spreading false news about "any great man of the realm." 4 Blackstone, *Commentaries*, ch. 11, 142-53 (Garland 1978). The common law authorities on misdemeanor arrests, Holt, Alderman, and Stephen, often interchangeably use the terms affray and breach of the peace. These authorities nevertheless make clear only those misdemeanors that pose a continuing threat of public violence justify an arrest as opposed to summons.

### B. Contemporary Legislation Demonstrates Society's Acceptance of the Common Law Limitations and Modern Technology Demonstrates the Sufficiency of the Limitation.

The common law provides the baseline rules regarding officer/citizen interactions. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). Changes in society may warrant reconsideration of the common law's baseline, changes in either the technology affecting police/citizen encounters or changes in societal views regarding police/citizen encounters. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In the instant case, modern technology and contemporary mores reinforce the common law's limitations on an officer's power to arrest for a misdemeanor. Modern technology has provided new means of assuring a misdemeanant's presence at trial without arrest and contemporary legislation demonstrates society's support for limits on an officer's power to arrest for a mere traffic infraction.

In *Garner*, this Court departed from the common law rule permitting deadly force to seize a fleeing felon. 471 U.S. at 11. The Court recognized that advances in technology and changes in public opinion compelled a departure. The effectiveness of modern weapons made use of a deadly weapon to apprehend a fleeing felon far more likely to kill than an attempt to seize a suspect with the weapons contemplated at the time of the common law rule. *Id.* at 11. The individual interest implicated by permitting the use of deadly force in the modern world was therefore more compelling than the interest implicated in a world where weapons were more likely to merely wound, or miss entirely. *Id.* Modern statutory limitations on the use of official force further illustrated that all reasonable means of seizing a non-violent fleeing felon at common law were not reasonable in modern times. *Id.* at 16-19.



Similarly, modern legislation and technology has made the use of a custodial arrest for a misdemeanor even less compelling than it was at the time it was forbidden by the common law. The Non-Resident Violator Compact has given a state the power to suspend the driver's license of a motorist of another state who fails to appear in court to answer a misdemeanor traffic charge. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 267 (1989). Computer technology permits an officer stopping such a motorist to rapidly learn the status of such motorist's license. *See* Darlene Cedrés, Note *Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement*, 23 Rutgers Computer & Tech. L. J. 391, 396-97 (1997) (noting that officers in patrol cars can access the National Crime Information Center and determine whether a driver's license has been suspended or revoked). Technology and legislation have given states a way of compelling appearance in misdemeanor traffic offenses unknown at common law -- at a time when the common law nonetheless prohibited a custodial arrest for misdemeanors.

*Garner* further looked to contemporary limitations on police use of force to determine whether deadly force ought to be permitted. Finding the modern trend to prohibit deadly force for non-violent fleeing felons, the Court found reasonableness should be assessed differently than it was under the common law. *Garner*, 471 U.S. at 16-19.

A growing number of states prohibit an officer from taking a misdemeanant into custody where the officer has no basis for believing the offender will fail to appear on the

charge and no basis for believing the offense will continue.[5] Limitations on the power to arrest for misdemeanors, common in many states, reveal that modern society finds it unreasonable to vest law enforcement officers with such unlimited discretion. Interestingly, Texas law, by statute, prohibits a custodial arrest for speeding. Tex. Trans. Code Ann. § 543.003 (West 1999). Speeding carries a higher fine under Texas law than the crime for which the petitioner was arrested, failure to wear a seat belt. And while speeding potentially endangers others, failure to wear a seat belt imposes a risk only to those who elect to violate the law.

## III. THE MANNER OF A SEIZURE MUST BE REASONABLE IN LIGHT OF THE STATE'S INTERESTS

Probable cause to believe a motorist has committed a crime, however minor, does not end the inquiry into the reasonableness of the seizure. Probable cause permits a seizure, *Whren v. United States*, 517 U.S. 806, 813 (1996), but the manner in which the seizure is carried out must be reasonable in light of the government's interest in the seizure. *Garner*, 471 U.S. at 8. The lower court decision would permit an officer to seize a citizen in any manner he saw fit

[5] *See, e.g.* Ala. Code § 32-1-4 (1989); Colo. Rev. Stat. § 42-4-1707 (1997); Haw. Rev. Stat. Ann. § 286-10 (Michie 1998); Ind. Code Ann. § 9-30-2-5 (Michie 1997); La. Rev. Stat. Ann. § 32:391(A) (West 1989); Md. Code Ann., Trans. § 26-202(a)(2) (1999); Mass. Gen. Laws Ann. ch. 90 § 21 (Law. Co-op. 1994); Minn. Stat. Ann. §.169.91 (West Supp. 2000); Neb. Rev. Stat. § 29-435 (1995); N.M. Stat. Ann. § 66-8-123 (Supp. 1998); N.D. Cent. Code § 39-07-07 (1987); Ohio Rev. Code Ann. § 2935.26 (West 1997); Okla. Stat. Ann. tit. 22 § 1115.1(A) (West Supp. 2000); Or. Rev. Stat. § 133.310(1) (1997); S.C. Code Ann. § 56-25-30 (Law. Co-op. Supp. 1991); S.D. Codified Laws § 32-33-2 (1998); Tenn. Code Ann. § 40-7-118(b)(1) (1997); Vt. R. Crim. P. 3(a), (c) (Supp. 1999); Va. Code Ann. § 46.2-936 (Michie Supp. 2000); Wis. Stat. Ann. §§ 345.22 to .23 (West Supp. 1999).



so long as the officer had probable cause to believe that some offense -- however petty -- had been committed and the arresting officer did not actually kill or maim the suspect. *Atwater v. City of Lago Vista*, 195 F.3d 242, 245 (5th Cir. 1999) (*en banc*).

### A. The State's Interest in Ensuring the Defendant's Presence at Trial and Protecting Society from a Criminal Suspect Does Not Justify a Custodial Arrest for a Fine-Only Misdemeanor.

Once a state has probable cause to believe a citizen guilty of a criminal infraction, the state's interests in taking custody of her consist of ensuring her presence at trial and ensuring that the citizenry is safe from her pending trial. *See United States v. Salerno*, 481 U.S. 739, 748 (1987) (recognizing these interests to justify pretrial detention). It has been recognized that the seriousness of the offense is a key indicator of the likelihood of the defendant appearing to answer the charges against her. Edward C. Fisher, *Laws of Arrest* 189 (1967). Further, this Court in *Salerno* recognized that the seriousness of the offense was a valid indicator of whether the defendant posed a threat to society if released pending trial. *Salerno*, 481 U.S. at 749. If a goal of punishment is incapacitation, society needs protection from the violent once their dangerous tendencies become evident.

For most modern misdemeanors, pretrial release is all but certain, making the relevant inquiry whether the misdemeanor suggests the defendant presents a danger she will not later present once booked and bonded out. The common law rule prohibiting misdemeanor arrest recognizes the legitimate interests of ensuring the offender's presence at trial and protecting society from the suspect. For ordinary misdemeanors, where the penalty is less than severe, the suspect is not likely to fail to appear as often the sanction for failure to appear exceeds the sanction for the underlying

misdemeanor. And, unlike the crimes of extortion and conspiracy to commit murder contemplated in *Salerno*,[6] the commission of a non-violent misdemeanor does not suggest that society needs immediate protection from the suspect.

Where, however, the state illustrates that the misdemeanant, despite the relative minor classification of his crime, does pose an immediate threat to public safety, the common law rule provides for his immediate incarceration. If the constable reasonably believed that the misdemeanant would continue to threaten harm to society if not arrested, then an arrest was permitted.

A modern example of a misdemeanor that itself suggests the necessity of incarceration is driving under the influence where the driver poses a risk to society because of his intoxication, a condition unchanged by his initial seizure. Modern statutes universally recognize an officer's right to arrest a motorist suspected of being intoxicated.[7]

*Whren v. United States*, 517 U.S. 806 (1996) stands for the rather unremarkable principle that any person who violates the traffic code may be forced to suffer the consequences established by the legislature, a very modest fine. *Whren* did not overrule this Court's holding that the degree of the intrusion occasioned to prosecute the offense must be balanced against the state's interest in that degree of intrusion.

[6] In *Salerno*, the defendants were charged with 35 acts of racketeering activity including fraud, extortion, gambling, and conspiracy to commit murder. *Salerno*, 481 U.S. at 743.

[7] *See, e.g.*, Tenn. Code Ann. § 40-7-118(c)(7) (requiring misdemeanor arrest "the person is so intoxicated that such person could be a danger to such person or to others.")



### B. Absent a Fear for Public Safety or Inability to Otherwise Bring Offender to Justice, the Means of Seizure May Not Exceed the Punishment Authorized for the Offense.

As this Court recognized in *Garner*, at common law, burglary was a capital crime. *Garner*, 471 U.S. at 13. Imploring deadly force to stop an unarmed burglar therefore involved no greater consequence than the burglar would face if convicted. Modern laws provide much more lenient penalties for burglary and this Court accordingly held in *Garner* that the consequence of death was disproportionate to the state's interest in ensuring prosecuting of a non-capital felon who posed no risk to the community. *Id.*

Judge Easterbrook has recognized that an arrest for a misdemeanor offense amounts to more punishment than will typically be assigned by a neutral judicial officer. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 441 (7th Cir. 1986). A warrantless arrest for such an offense is a decision by a member of the law enforcement community to bring about a sanction exceeding that likely imposed by a neutral and detached judicial officer. When the offense is a fine-only misdemeanor, the law enforcement officer has visited a sanction upon a citizen exceeding even a judicial officer's *authority* to punish.

## CONCLUSION

The decision of United States Court of Appeals for the Fifth Circuit misconstrued this Court's precedent regarding limitations on the manner of seizure an officer may perform once he has probable cause. A custodial arrest for the offense of failure to wear a seat belt is no more reasonable than the slaying of non-violent fleeing felon. The judgment of the Court of Appeals should be reversed.

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